IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE AIR CRASH NEAR PEGGY'S COVE, NOVA SCOTIA ON SEPTEMBER 2, 1998	:	MDL DOCKET NO. 1269
	:	This Document Relates to
	:	LAMOTTA v. SWISSAIR,
	:	NO. 99-5998 (E.D. Pa.)

MEMORANDUM

Giles, C.J. November 2, 2004

I. Introduction

Before the court are Respondents' Swissair Swiss Air Transport Company Ltd. ("Swissair"), SR Technics, AG ("SRT"), The Boeing Company ("Boeing"), McDonnell Douglas Corporation ("MDC"), Hollingsead International, Inc. ("Hollingsead"), and E.I. duPont de Nemours and Company's ("DuPont") motions to dismiss Interactive Flight Technologies' ("IFT") First Amended Cross-Claims asserted against all Respondents. IFT has asserted a number of claims, which can be grouped into three categories: (1) tort indemnity and/or contribution, (2) express contractual indemnity, and (3) implied contractual indemnity. For the reasons discussed below, the Respondents' motions to dismiss are granted and IFT's third party complaints are dismissed with prejudice.

II. Background

On September 2, 1998, after departing the John F. Kennedy ("JFK") Airport en route to Geneva, Switzerland, while over international waters off the coast of Nova Scotia, Canada, crew members aboard Swissair Flight No. 111 first detected odor of smoke and then noticed smoke coming from a small area just above the right rear cockpit wall, just forward of the cockpit rear

wall. After declaring an emergency, the flight was directed to abort its scheduled path and to proceed to the Halifax airport in Nova Scotia. Before reaching Halifax, Flight 111 crashed into the Atlantic Ocean killing the 215 passengers and 14 crew members on board.

The Transportation Safety Board of Canada ("TSB") conducted an initial inspection of the salvaged remains of Flight 111 trying to determine the cause of the crash. The TSB concluded that a fire had spread from a small area near the cockpit ceiling, but it was unable to determine the exact cause of the fire's ignition. The TSB surmised from its investigation that the fire's start was likely the result of wire arcing from a pair of In-Flight Entertainment ("IFEN") system PSU cables, which arcing was intense and close to thermal acoustical insulation blanket material, which, in turn, became involved in the fire.

Following the crash, aggrieved family members filed lawsuits against various defendants associated with Flight 111. MCD manufactured the MD-11 aircraft. Boeing owns MDC and is acting as its successor-in-interest. IFT developed, designed, and marketed the IFEN system. DuPont manufactured and supplied the thermal insulation blankets. Swissair controlled and operated the international flight from the JFK airport to Switzerland and was the contractual partner of IFT with respect to the IFEN system. Hollingsead, as IFT's subcontractor, performed engineering and installation of the IFEN system onto the Swissair operated aircraft. SRT, as the subcontractor for both Swissair and IFT, provided facilities, support, oversight, and monitoring of the installation of the IFEN system**.** SRT also certified the aircraft as being airworthy after installation. Santa Barbara Aerospace ("SBA"), as subcontractor by Hollingsead, obtained certification from the Federal Aviation Association ("FAA") for installation of the IFEN system.

To date, Swissair and Boeing (by and for MCD) have settled all outstanding lawsuits

brought by the estates of the Flight 111 victims. In each settlement, Swissair and Boeing provided for the release of all Defendants from liability, including IFT. IFT has paid no claim pertaining to passengers, crew or lost aircraft. After settlement, Swissair asserted cross-claims for indemnity and/or contribution from the other Defendants associated with the crash of Flight 111. To date, all the other Defendants have settled with Swissair and Boeing, save IFT. In response to Swissair and Boeing's cross-claim against it for indemnity and/or contribution, IFT filed an action for indemnity and/or contribution against Respondents, or all settling Defendants, except for SBA. In its cross-claims, IFT asserts tort indemnity and/or contribution against SRT, Hollingsead, Boeing, MDC and DuPont, express contractual indemnity against Swissair and Hollingsead, and implied contractual indemnity against Swissair, SRT and Hollingsead.

III. Standard for Motion to Dismiss

Dismissal of a complaint pursuant to Rule 12(b)(6) is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). The court must accept all of plaintiff's allegations as true and draw all reasonable inferences therefrom. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) ("the material allegations of complaint are taken as admitted"); Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993) ("[a]t all times in reviewing a motion to dismiss we must 'accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom.'" (quoting Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990))).

IV. Discussion

1. Tort Indemnity and/or Contribution Claims Against SRT, Hollingsead, Boeing, McDonnell Douglas and DuPont

In its cross-claim against Respondents, IFT argues that it is entitled to tort indemnity under maritime law on the grounds that it was not negligent to any degree in causing the crash of Flight 111 or that, in the alternative, its negligence, if any, was only secondary and passive to the negligence of Respondents. (Def.'s First Am. Cross-cl. ¶¶ 50, 60, 71, 78). Respondents respond that the seminal decisions of the United States Supreme Court in United States v. Reliable Transfer Co., Inc., 421 U.S. 397 (1975) and McDermott, Inc. v. AmClyde, 511 U.S. 202 (1994) have eroded the availability of tort indemnity under maritime law, except in the case of vicarious liability, which is inapplicable here.

The doctrine of tort indemnity[1] developed in maritime law to mitigate against the harsh liability that became imposed upon joint tortfeasors under the rule of joint and several liability when the negligence or fault of one tortfeasor was much greater than the fault of the other. See Thomas J. Schoenbaum, Admiralty & Maritime Law § 5-18(2)(a) (4th ed. 2004). This doctrine held sway until the Supreme Court's 1975 decision in Reliable Transfer. There, the Court decided that justice and judicial economy required allocation of liability among joint tortfeasors according to principles of comparative fault. 421 U.S. at 403, 411. The Court stated "that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault . . . ." Id. at 411. Following Reliable

[1] Also referred to as "restitution indemnity" or "common law indemnity."

Transfer, requests for the application of tort indemnity and its corresponding passive-active distinction were consistently rejected by lower courts. As the Fifth Circuit noted in Loose v. Offshore Navigation, Inc., 670 F.2d 493, 502 (5th Cir. 1982), "the concepts of active and passive negligence have no place in a liability system that considers the facts of each case and assesses and apportions damages among joint tortfeasors according to the degree of responsibility for each party."

The Court's 1994 decision in McDermott buttressed Reliable Transfer. The Court there considered the appropriate allocation of liability between multiple defendants under maritime law after a settlement with fewer than all defendants. 511 U.S. at 207. It held that "no suits for contribution from the settling defendants are permitted, nor are they necessary, because the nonsettling defendants pay no more than their share of the judgment." Id. at 209. This approach best effectuated the proportionate fault approach established in Reliable Transfer, the promotion of settlement, and judicial economy. Id. at 211. Further, on the same day that McDermott was decided, the Court held in Boca Grande Club, Inc. v. Florida Power & Light Co., Inc., 511 U.S. 222, 222 (1994) as to allocation of rights between multiple defendants, that "actions against settling defendants are neither necessary or permitted," given the Court's adoption of the proportionate share rule.

Recognizing that Reliable Transfer and McDermott bar IFT's claims for contribution from Respondents, IFT nevertheless argues that those decisions did not foreclose tort indemnification, leaving IFT free to now assert claims for indemnity against Respondents. (Def. IFT's Opp'n to the Mots. To Dismiss IFT's Cross-cls. at 5-7). This position is untenable. It fails to comprehend the essence of the proportionate liability approach to assessing the degree of fault,

of alleged joint tortfeasors. After Reliable Transfer and McDermott, IFT can only be held liable for its own independent degree of fault, if any, in causing the tragic crash of Flight 111. If a jury were to determine that IFT is completely without fault, IFT will not have to pay anything to satisfy claims made by Flight 111 victims or the other Defendants. Contribution and indemnification are distinct doctrines,[2] and the principles of proportionate fault apply equally to both. Under the doctrine of proportionate responsibility, a defendant will never be held liable for another's degree of fault. Given the settlements already reached with Flight 111 victims, there is no set of circumstances under which IFT will be required to pay monies on the behalf of other Defendants.

IFT continues to press that the passive-active distinction remains a viable doctrine in the Third Circuit. (Def. IFT's Opp'n to the Mots. To Dismiss IFT's Cross-cls. at 14-17). Suffice it to say, a passive-active distinction is no longer viable in any circuit following Reliable Transfer and McDermott.

The Third Circuit first considered the availability of the passive-active distinction shortly after Reliable Transfer in Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116 (3d Cir. 1979). In Griffith, the employer ("Wheeling") sought indemnity from a negligent barge owner ("American") for injuries sustained by one of its employees. Id. at 129. Wheeling argued that it was entitled to indemnification from American, who was primarily or actively negligent, for the alleged injuries. Id. After discussing Reliable Transfer, the Third Circuit concluded that a rule which would relieve a passive tortfeasor from all liability seemed "strongly at odds with the

[2] Contribution applies when one tortfeasor pays more than its proportionate share of a judgment, while indemnification requires one tortfeasor to reimburse another fully when the other tortfeasor has discharged a common liability.

preference for comparative fault expressed in Reliable Transfer." Id. The court concluded that it could "see no good reason why in this non-collision maritime context the fact that Wheeling's conceded negligence as owner Pro hac vice may have been less egregious than that of American should justify the creation of a right of indemnity which would impose sole responsibility for the accident on America, while allowing Wheeling to go scot-free." Id. at 130.

Despite Griffith's clear abandonment of the passive-active distinction, IFT argues subsequent decisions in M&O Marine, Inc. v. Marquette Co., 730 F.2d 133 (3d Cir. 1984) and SPM Corp. v. M/V Ming Moon, 22 F.3d 23 (3d Cir. 1994) show the continued availability of the doctrine in this circuit.

M&O Marine did not preserve the passive-active distinction. The court found that the plaintiff had produced sufficient evidence to establish a contractual indemnification relationship between itself and the defendant. 730 F.2d at 135. Although SPM found that "a passively negligent party in admiralty can recover indemnity damages from a primary negligent party," the underlying reasoning is tantamount to saying that vicarious liability is an exception to the comparative fault approach. 22 F.3d at 526. The court held that indemnification was warranted because "[t]here is no allegation that [indemnitor] did anything wrong–its liability arose entirely from its contractual relationship with [indemnitee] and was triggered by [the indemnitee's agent's] negligence." Id.

Both M&O Marine and SPM were decided prior to the Supreme Court's decision in McDermott. Since McDermott, no third circuit decision has used the passive-active distinction, even in the context of vicarious liability. To do so would be to reintroduce the very confusion that the Supreme Court has tried to eliminate in maritime disaster litigation.

Following Reliable Transfer and McDermott courts have recognized the continued viability of tort indemnity claims only where the ground for the claimant's liability is vicarious in nature. See SPM, 22 F.3d at 526; Weissman v. Boating Magazine, 946 F.2d 811, 813 (11th Cir. 1991); Vaughn v. Farrell Lines, Inc., 937 F.2d 953, 957 (4th Cir. 1991); Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa, 761 F.2d 229, 236 (5th Cir. 1985); Maritime Overseas Corp. v. Northeast Petroleum Indus., Inc., 706 F.2d 349, 353 (1st Cir. 1983). After settling claims with the aggrieved party, claimants were permitted to proceed against co-defendants for indemnification in light of a judicial finding that the moving party was completely without fault for the injury for which it assumed liability. See Marathon Pipe Line, 761 F.2d at 231-32 (judicial finding that party seeking indemnification was without fault after settling with injured party); SPM, 22 F.3d at 527 (same); Vaughn, 937 F.2d at 957 (same). In those cases, parties were permitted to seek tort indemnification based on the "principle of restitution," where "one person discharges liability that has been imposed on him by operation of law, but which should have been discharged by another." Vaughn, 937 F.2d at 957.

Here, IFT has not settled any claim or paid any judgment for which it would have grounds to seek indemnification from any defendant. Nor has IFT suffered liability, actual or constructive, given Swissair's release of IFT during Swissair's and Boeing's settlements. The rationale for permitting indemnification–that a party who is innocent of any wrongdoing has been made to pay for the debts of another–is inapplicable to IFT. There has not been a judicial finding that IFT is without fault in the crash of Flight 111. Under the comparative fault doctrine, should a jury determine that IFT has some causative fault, a judgment for only its own comparative fault would result. Liability for one's own negligence negates a tort indemnification action based on a

theory of vicarious liability. See Weissman, 946 F.2d at 813 ("Even though there also may be some vicarious, constructive, derivative, or technical liability, the active negligence or fault defeats an indemnity action.").

In conclusion, IFT is not entitled to tort indemnification or contribution from SRT, Hollingsead, Boeing, McDonnell Douglas or DuPont.

2. Express Contractual Indemnification

A. Express Contractual Indemnity Against Swissair

IFT argues that it is entitled to express contractual indemnification from Swissair based on Swissair's breach of an indemnification clause found in the IFEN-2 Sales and Services Agreement ("the Agreement") with Swissair. (Def.'s First Am. Cross-cl. ¶¶ 31-33). Swissair responds that the indemnity clause of the Agreement only pertains to claims made against IFT or Swissair by third parties and does not cover disputes between the parties to the Agreement. (Def. Swissair's Mem. of Law in Supp. of Mot. to Dismiss First Am. Cross-cl of IFT at 3). This court agrees. IFT is not entitled to express contractual indemnity from Swissair. The parties' contract clearly and unambiguously restricts indemnification to claims brought by third parties. Nowhere does it provide for indemnification for a party's own negligence. Therefore, a comparison of each party's negligence, if any, must be submitted to a jury under Reliable Transfer and McDermott.

Express contractual indemnity is recognized and enforceable under maritime law. Thomas J. Schoenbaum, Admiralty & Maritime Law § 5-20 (4th ed. 2004). Contract interpretation begins with the plain language of the written agreement and words must be given their ordinary meaning. In re Tops Appliance City, Inc., 372 F.3d 510, 514 (3d Cir. 2004); In re

Kaplan, 143 F.3d 807, 816 (3d Cir. 1995); Independent Oil Workers v. Mobil Oil Corp., 441 F.2d 651, 653 (3d Cir. 1971); Atlantic Mutual Ins. Co. v. Brotech Corp., 857 F. Supp. 423, 427 (E.D. Pa. 1994). See also Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1214 (5th Cir. 1986) (applying the plain language principle in maritime cases); Weathersby v. Conoco Oil Co., 752 F.2d 953, 955 (5th Cir. 1984) (same); Roberts v. Williams-McWilliams Co., Inc., 648 F.2d 255, 264 (5th Cir. 1981) (same). The purpose of contract interpretation is to give effect to the intention of the parties as expressed in their agreement. See Gleason v. Northwest Mortgage, Inc., 243 F.3d 130, 138-39 (3d Cir. 2001); Siegel Transfer, Inc. v. Carrier Exp., Inc., 54 F.3d 1125, 1139 (3d Cir. 1995). To determine the parties intention, the contract must be interpreted as a whole. Williams v. Metzler, 132 F.3d 937, 947 (3d Cir. 1997); Capitol Bus Co. v. Blue Bird Coach Lines, Inc., 478 F.2d 556, 560 (3d Cir. 1973). A "court cannot interpret words in a vacuum, but rather must carefully consider the parties' context and the other provisions of the plan." In re New Valley Corp., 89 F.3d 143, 149 (3d Cir. 1996).

Section 18 of the Agreement reads "Indemnification." Subsection 18.1, entitled "Indemnity," states:

> Each party hereto agrees to indemnify and hold the other parties hereto, and their respective officers, agents, employees, and assignees, harmless from and against any claims, demands, causes of action, losses, liabilities and expenses, including without limitation attorneys' fees and costs of litigation (collectively, "Losses"), suffered or arising as a result of any breach, of such indemnifying party's warranties, representations or covenants in this Agreement. The party obligated to provide such indemnification is hereinafter referred to as the "Indemnifying Party" and any party entitled to such indemnification is hereinafter referred to as an "Indemnified Party."

Subsection 18.2, entitled "Procedure," states:

> Promptly upon receipt by an Indemnified Party of a notice of a claim by a third party that may give rise to a claim under this Section 18, the Indemnified Party shall give written notice thereof to the Indemnifying Party. The Indemnified Party shall allow the Indemnifying Party to assume control of the defense of any such action and to contest or settle such claim on such terms as the Indemnifying Party may choose, provided that the Indemnifying Party will not have the right, without the Indemnified Party's written consent, to settle any claim if such settlement (I) arises from or is part of any criminal action, suit or proceeding, (ii) contains a stipulation to, confession of judgment with respect to, or admission or acknowledgment of, any liability or wrongdoing on the party of the Indemnified Party, (iii) provides for injunctive relief, or other relief other than damages, which is binding on the Indemnified Party. (Emphasis added)

Subsection 18.3, entitled "Cooperation," states:

> The Indemnifying Party and the Indemnified Party shall cooperate in determining the validity of any claim for any Loss for which a claim of indemnification may be made hereunder. Each party shall use all reasonable efforts to minimize all Losses.

Finally, subsection 18.4, entitled "Limitation of Liability," states:

> EXCEPT AS OTHERWISE EXPRESSLY SET FORTH IN THIS AGREEMENT, IN NO EVENT SHALL ANY PARTY BE LIABLE TO ANY OTHER PARTY HERETO OR TO ANY THIRD PARTY FOR ANY CONSEQUENTIAL, SPECIAL, PUNITIVE, OR INCIDENTAL DAMAGES INCLUDING, BUT NOT LIMITED TO, LOST PROFITS OR OTHER ECONOMIC LOSS (WHETHER ARISING FROM BREACH OF CONTRACT OR TORT) EVEN IF APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES OCCURRING.

IFT argues that the clause "any claims" in subsection 18.1 provides for express contractual indemnification and manifests the parties' intent to indemnify each other for claims arising between themselves for breach of contract. IFT's reading is totally unreasonable.

Section 18 of the Agreement sets out the rights and responsibilities of IFT and Swissair

with regards to claims for indemnification suffered or arising from the indemnifying party's breach of warranties, representations, or covenants in the Agreement, which cause harm. The section presupposes that one contracting party will have paid a claim by a third person which could have been asserted against the other contracting party. Subsection 18.2 specifies the procedures to be followed once the right of indemnification is triggered. Indemnification arises when a party, either IFT or Swissair, is given "notice of a claim by a third party." (emphasis added). This trigger section manifests the parties' undertaking to only indemnify each other from claims asserted against either by third parties. Once indemnification is triggered, the parties are obligated by §§ 18.3 to cooperate and use all reasonable efforts to minimize the loss which could be occasioned as a result of these claims. The parties are obligated to act in each other's interest, and are not permitted to be adversaries, as would be the case if they had the right to make claims against each other. Subsection 18.4 expressly limits liability between IFT and Swissair to those rights which are expressly set forth in the Agreement. Section 18 of the Agreement in its totality represents the full scope and limitation of the parties' right of indemnification, with each subsection contributing to a cohesive plan of action once indemnification is triggered.

This plain reading of the indemnification undertaking is underscored by the structure and language of other sections of the Agreement. For example, section 8 of the Agreement sets forth the rights and responsibilities of IFT and Swissair with regards to product support and warranties. The first subsections of section 8 outline the specific support and warranties agreed by the parties, while the later subsections provide the procedure to be followed if the product warranties are breached. More importantly, in the event of nonperformance or a defect in the system, the section provides a monetary penalty model for compensation rather than a reimbursement or

indemnification model for loss. Such penalty model is wholly inconsistent with a claim for indemnification. Finally, section 19.9 of the Agreement covers completely all disputes by and between IFT and Swissair. Such are required to be submitted for arbitration and the possible remedies for breach are not limited to reimbursement or indemnification.[3] Existence of the arbitration section reinforces the court's reading of section 18 as an undertaking by the parties to indemnify each other for third party claims, only.

However, most importantly, there is no language in the Agreement which manifests Swissair's intention to indemnify IFT for IFT's own negligence. This finding, alone, defeats IFT's contractual indemnification claim against Swissair.

B. Breach of Express Warranty Against Hollingsead

IFT also asserts a claim against Hollingsead for indemnification based on the allegation that Hollingsead breached an express warranty between itself and IFT as contained in the Agreement Between Interactive Flight Technologies, Inc. and Hollingsead International ("the Hollingsead Agreement"). (Def.'s First Am. Cross-cl. ¶ 63). Specifically, IFT argues that Hollingsead breached its "warranty of workmanlike performance," resulting in sufficient grounds for indemnification between the parties. (Def. IFT's Opp'n to the Mots. To Dismiss IFT's Cross-cls. at 31). In its motion to dismiss, Hollingsead asserts that (1) the scope of the warranty provision is limited to replacement or repair of any defective installation kit or parts and (2) indemnification between the parties is expressly limited to claims for patent, trademark, or

[3] Section 19.9.2 empowers the arbitrator to make awards to the maximum extent allowed by Swiss laws applied to the agreement, interim relief, including injunctive relief, and section 19.9.3 permits awards for costs, including reasonable attorneys' fees, disbursements, and the costs of translation or interpretation.

copyright infringement. (Def. Hollingsead, Intl., Inc.'s Notice of Mot. To Dismiss at 12-16). The court agrees with Hollingsead.

The applicable contract language for IFT's claims for indemnification from Hollingsead are sections 6 and 11 of the Hollingsead Agreement. Section 6, entitled "Warranty," has two subsections. The first subsection, 6.1, provides:

> If within 60 months after installation of any of the Kits on any Customers' Aircraft, there shall be any defect in the Kits or part(s) thereof as a result of HI's defective design, faulty materials or workmanship or faulty installation which defect arises under normal use of the Kits and occurs without abuse or negligence of IFT, the Customer or any third party, HI shall remedy the defect at its option by either replacement or repair of the defective Kits or any part(s) thereof. Any such repair or replacement of Kits or part(s) thereof shall be made within 10 business days of receipt of the defective Kits or part(s) thereof by HI. IFT shall be responsible for all transportation of parts and materials returned to HI for warranty disposition. HI shall be responsible for surface transportation charges from its facility in Santa Fe Springs, California to the designated Freight Forwarder in Los Angeles, California.

Subsection 6.2 provides:

> HI hereby represents and warrants to IFT that (I) HI shall comply with all applicable federal, state and local laws in effect at the time services are performed and goods are delivered, including all professional registration requirements; (ii) that all Services and Installation Labor shall be performed consistent with generally accepted professional standards and in an expeditious and economical manner.

A plain reading of the language in §§ 6.1 shows that the parties agreed that the scope of remedial action, were Hollingsead to provide either a defective product or deficient service regarding the installation kits, would be replacement or repair, and nothing more. Therefore, IFT's assertion that it is entitled to indemnification in the form of money damages has no

contractual basis. As Hollingsead points out, the only express indemnification specified in the Agreement is found in § 11, which pertains to infringement of intellectual property rights. Thus, there is no basis for IFT's contention that it is entitled to express contractual indemnification from Hollingsead premised upon Hollingsead's alleged violation of a warranty provision.

3. Implied Contractual Indemnification

In its First Amended Cross-Claims against Respondents, IFT asserts that it is entitled to implied contractual indemnification from Respondents Swissair, SRT, and Hollingsead. Specifically, IFT argues that either the presence of "unique factors" or the nature of the relationship between IFT and the individual Respondent gives rise to a viable claim for implied contractual indemnity. In each instance, Respondents answer that no unique factors or special relationships exist for which IFT is owed indemnification. As the designer of the IFEN system, IFT had a non-delegable duty to deliver a safe product for installation and use in the Swissair operated aircraft. No other party by contract relieved IFT of this independent duty to Swissair. Therefore, the degree of IFT's own negligence regarding its role in the tragic crash of Flight 111 must be submitted to a jury for its judgment under the comparative fault doctrine.

As a general principle, indemnification is applicable "when two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment." Restatement (Third) of Torts: Apportionment Liab. § 22 (2000). To the extent liability could, or would be, imposed on IFT, it would only be for IFT's own proportionate share of fault for the crash of Flight 111. Therefore, under principles of indemnification IFT cannot have claims for indemnification against Swissair, SRT,

and Hollingsead. It follows that the claims for implied contractual indemnification also fail as a matter of law.

A. Implied Contractual Indemnity

Implied contractual indemnification has been recognized in maritime law when "there are unique special factors demonstrating that the parties' intended that the would-be indemnitor bear the ultimate responsibility for the plaintiff's safety" or "when there is a generally recognized special relationship between the parties." Araujo v. Woods Hole, Martha's Vineyard, Nantucket Steamship Auth., 693 F.2d 1, 2-3 (1st Cir. 1982). See Somarelf v. Am. Bureau of Shipping, 704 F. Supp. 59, 61 (D.N.J. 1989); Allied Corp. v. Frola, Civ.A.No.87-462, 1993 WL 388970 at *10 (D.N.J. Sept. 21, 1993).

The first element of implied contractual indemnity looks to the parties' intention that one party will bear the ultimate responsibility for all harm resulting from breach of contract. Another form of the same situation is when one party "holds a non-delegable duty to a third party, but transfers this responsibility to [another] by implied agreement." General Conference of Seventh-Day Adventists v. Aon Reinsurance Agency, Inc., 860 F. Supp. 983, 986 (S.D.N.Y. 1994). If the delegating party is held liable to a third-party for the actions it agreed would be borne by the delegated party, courts will imply contractual indemnity. However, "[n]o right to indemnification exists [] when the proposed indemnitee retains responsibility for a duty it owes directly to a third party." Id. at 987. Therefore, upon review, a court must look to the terms of the contract to determine whether (1) the parties intended that only one, as opposed to both, would bear responsibility for the consequences of their joint actions, and/or (2) the delegating party retained its own independent duty to a third-party. See Maritime Overseas, 706 F.2d at 354

(noting that implied contractual indemnity depends upon the terms of the contract giving rise to the warranty); Sundance Cruises Corp. v. Am. Bureau of Shipping, 799 F. Supp. 363, 385 (S.D.N.Y. 1992) (same).

The second element of implied contractual indemnity focuses upon whether the nature of the relationship between the parties is such that justice requires implying contractual indemnity. Relationships which have been recognized to support this inference include principal-agent, bailor-bailee, lessor-lessee, union-union member, employer-employee, vessel owner-medical provider, stevedores, and independent contractors. See Allied Corp., 1993 WL 388970 at *10; Seariver Maritime, Inc. v. Indus. Med. Serv., Inc., 983 F. Supp. 1287, 1298 (N.D. Cal. 1997); Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 133-34 (1956); Cooper v. Loper, 923 F.2d 1045, 1050-51 (3d Cir. 1991); Burnett v. A. Bottacchi S.A. de Navegacion, 882 F. Supp. 1050, 1053 (S.D. Fla. 1994). Contract indemnity has been implied in these circumstances because courts have recognized that one party's expertise and control over the activity place it in the best position to avoid harm to innocent third parties. See Fairmont Shipping Corp. v. Chevron Int'l Oil Co., 511 F.2d 1252, 1257 (2d Cir. 1975); Geyer v. USX Corp., 896 F. Supp. 1440, 1449 (E.D. Mich. 1994); Somarelf, 704 F. Supp. at 62; Maritime Overseas, 706 F.2d at 353-54; Sundance Cruises, 799 F. Supp. at 384-85. The classic example under maritime law is the vessel owner-stevedore relationship. In this situation, the "shipowner, relying on the stevedore's expertise, entrusts loading operations to its supervision and control, thereby putting the stevedore in the best position to prevent accidents." Fairmont, 511 F.2d at 1257-58. What makes this relationship special is not only that the shipowner relies on the stevedore's expertise, but that the stevedore enters into a contract with the shipowner whereby

the stevedore "agrees to perform services without supervision or control by the shipowner." Id. at 1258. In assessing whether to imply contractual indemnity, a court must decide whether the relationship between the parties evidences an implicit agreement or understanding that only one, as opposed to both, will have ultimate control over the enterprise and thus be in the best position to avoid harm to third parties.

B. Implied Contractual Claim Against Swissair

IFT argues that it is entitled to implied contractual indemnity from Swissair because Swissair bore ultimate responsibility for the safety of passengers aboard Flight 111, as evidenced by Swissair's regulatory duty to certify the aircraft as airworthy following the installation of the IFEN system. (Def. IFT's Opp'n to the Mots. To Dismiss IFT's Cross-cls. at 24-25). Swissair responds that no unique factor or special relationship exists between IFT and Swissair that would give rise to a viable claim for implied contractual indemnity. (Def. Swissair's Mem. Of Law in Support of Mot. To Dismiss First Amended Cross-cls. of IFT at 19-20).

A plain reading of the Agreement between Swissair and IFT shows that the parties did not intend that Swissair bear sole or ultimate responsibility for the installation and use of the IFEN system. Rather, the court finds that the contract envisioned that both Swissair and IFT would bear that responsibility.

The Agreement begins by recognizing that IFT is the developer of the IFEN system and has entered into a contract with Swissair for the purchase and installation of the IFEN system onto Swissair aircraft.[4] The Agreement then outlines the specific obligations of IFT in regards to

[4] Section B of the Agreement states that "IFT has developed the IFEN . . . computer network used for in-flight passenger entertainment . . . ." Section C recites that "IFT and Swissair are parties to that certain [Agreement], pursuant to which IFT has installed or is

the installation, maintenance, and support of the IFEN system. Specifically, the Agreement provides that IFT (1) will obtain "the [FAA] Supplemental Type Certificate ("STC") for the Trial Shipsets" and obtain "the required STC for the Shipsets to be installed on the remaining airplanes" (Section 4.1 of the Agreement), (2) "has installed or is installing each of the Trial Shipsets" and "be responsible for installation of the Shipsets on the remaining sixteen Airplanes" (Section 4.2.1.1 of the Agreement), (3) "shall develop a requirements-level test which is to be performed on each installed Shipset which . . . fairly measures the performance and functionality of such Shipset against the Specifications" (Section 4.2.2 of the Agreement), (4) "shall provide all Routine Maintenance services with respect to the Shipsets" which includes "removing defective parts and installing replacement parts" (Section 7.2.2 of the Agreement), and (5) "provide classroom training for Swissair's cabin crew personnel" which "shall include instruction as to the duties of Swissair personnel" (Section 7.4 of the Agreement).

These provisions show that the intention of Swissair and IFT was to share responsibility of the installation and use of the system in the aircraft. Contrary to IFT's contention that the contractual relationship between Swissair and IFT is of a kind necessitating the court's recognition of implied contractual indemnification, the terms of the contract establish that Swissair and IFT intended that IFT would remain involved with Swissair regarding the use and operation of the IFEN system.[5] While Swissair had an independent duty to insure passenger

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installing the Trial Shipsets." The Agreement further specifies in section 2.1 that "Swissair agrees to purchase from IFT, and IFT agrees to sell to Swissair, sixteen (16) Basic IFEN Shipsets for installation by IFT on each of the remaining MD-11 and B-747 Airplanes . . . ."

[5] For example, section 10 of the Agreement, entitled "Division of Revenues," provides for gross gaming profits to be shared by IFT and Swissair. The contract also anticipates in sections 7.7 and 7.8 that Swissair and IFT will work together to use their "commercially

safety, IFT also retained an independent duty to insure that passengers were not harmed as a result of its role in the design and installation of the IFEN system. Lastly, there is no evidence that Swissair and IFT agreed that one would indemnify the other for the other's own, active negligence.

C. Implied Contractual Claim Against SRT

IFT argues that it is entitled to implied contractual indemnity from SRT on the grounds that SRT, as Swissair's agent, bore ultimate responsibility for passenger safety. IFT also asserts that it is entitled to implied contractual indemnity from SRT because the contract between Swissair, IFT, and Swissair designated SRT as the party ultimately responsible for supervising and monitoring the work of Hollingsead, that is, that IFT delegated complete control to SRT for the potentially negligent work of Hollingsead. (Def. IFT's Opp'n to the Mots. To Dismiss IFT's Cross-cls. at 26-27). In determining the viability of IFT's claims against SRT, this court must determine whether the contract between SRT and IFT demonstrates their intention to hold SRT ultimately responsible for the supervision of Hollingsead and whether the nature of the contractual relationship between IFT and SRT evidenced an agreement or understanding that SRT would have total responsibility for, and control over, the work for which it contracted with IFT.

To determine whether IFT is entitled to implied contractual indemnity from SRT analysis focuses on the contract between SRT, IFT, and Swissair (the "Three-Party Contract"). The Three-Party Contract begins with the explanation that Swissair has contracted with IFT to

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reasonable best efforts to market the use of the Shipsets by the passengers" and to "promot[e] the IFEN system to other potential airline customers."

purchase the IFEN system which will be installed onto Swissair aircraft by Hollingsead on IFT's behalf.[6] SRT's responsibilities, outlined in section 1, were:

- to participate in contractual negotiations,
- to work out the specifications required,
- to coordinate the project work within [Swissair] Technical Services and with IFT,
- to coordinate the work of Hollingsead,
- to assist the modification crew,
- to allow its infrastructure to be used for installation purposes.

Nowhere in the contract does SRT explicitly or implicitly undertake to insure the work of Hollingsead. In fact, the contract specifically states that SRT is not familiar with Hollingsead's work and that supervision by IFT is required.[7] Furthermore, the Three-Party Contract demonstrates that SRT anticipated that IFT would continue to be involved in the installation process to meet its obligation to provide a safe product to Swissair and its passengers. SRT did not agree to monitor and supervise the work of Hollingsead without the supervision and involvement of IFT. Therefore, IFT is not entitled to implied contractual indemnity from SRT.

D. Implied Contractual Claim Against Hollingsead

Finally, IFT argues that it is entitled to implied contractual indemnity from Hollingsead on the theory that Hollingsead is an independent contractor upon which IFT totally relied. (Def. IFT's Opp'n to the Mots. To Dismiss IFT's Cross-cls. at 29). In order for IFT to sustain its claim

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[6] Section 1, entitled "Management Summary," provides that "[t]he SWISSAIR Airline has decided to equip our MD-11 and B747 aircraft with an interactive In-Flight Entertainment (IFE) system. The system will be provided by Interactive Flight Technologies (IFT) and will be installed in the SWISSAIR aircraft on IFT's behalf by Hollingsead International."

[7] Section 4.2 of the Three-Party Contract, entitled "Quality assurance," states "We are not familiar with Hollingsead. In order to ensure that their modification works meets regulations and standards set by civil aviation authorities, the aircraft producers and SWISSAIR Airline, their work will be continuously monitored, and, where needed, corrected."

against Hollingsead for implied contractual indemnity, it must establish that it not only relied upon Hollingsead, but that Hollingsead agreed by contract to perform its services without the supervision or control of IFT. The Hollingsead Agreement shows no such intention.

After reciting IFT's role as the designer of the IFEN system, the Hollingsead Agreement lays out the general responsibilities of both parties. Specifically, Hollingsead was contracted for the purpose of "providing to IFT the engineering services [], manufacture of the installation kits [], the installation labor [], and airworthiness certification . . . ." (Section C of the Hollingsead Agreement). IFT retained "sole responsibility for the technical validation and total system architecture" of the IFEN system. (Section D of the Hollingsead Agreement). IFT was entitled to "witness the work associated with [Hollingsead's] Services, manufacture of Kits or parts(s) therefore or Installation Labor" and to "inspect and test the kits" developed by Hollingsead. (Section 3.5 of the Hollingsead Agreement). IFT and Hollingsead Project Managers were to meet on a frequent basis, at least one a week, to check-in about the project's progress. (Section 5.2 of the Hollingsead Agreement). Furthermore, in multiple sections addressing the obligations and responsibilities of Hollingsead, the contract explicitly refers to cooperation, coordination, and supervision by IFT. For example, Hollingsead contracted to perform inspections "in conjunction with IFT." (Section 2.2(r) of the Statement of Work Agreement). IFT was explicitly required to "evaluate and validate [Hollingsead's] design to ensure that the technical requirements are operationally acceptable, acceptable to the airline Customer, and that the design allows implementation of the System." (Section 2.3 of the Statement of Work Agreement). Technical support would be provided by Hollingsead "with a direct communication line between IFT and [Hollingsead]." (Section 2.7 of the Statement of Work Agreement). Finally, all cabling

for the IFEN system was "subject to approval by IFT." (Section 3.1.7 of the Statement of Work Agreement). Therefore, the terms of the Hollingsead Agreement establish that, although IFT relied on the work of Hollingsead, as all contractors rely on the work of their subcontractors, at no time did Hollingsead agree or imply that it would perform its services without the supervision or control of IFT. Therefore, as the designer of the IFEN system IFT retained responsibility for its own, active role, if any, in causing harm to third parties.

V. Conclusion

For the foregoing reasons, Respondents Swissair, SRT, DuPont, Boeing, MDC, and Hollingsead's Motions to Dismiss Defendant IFT's First-Amended Cross-Claims are granted. An appropriate Order follows.